IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Misc. Appl. No. 358 of 2005

Date of decision:- 22.6.2005

A.F.R. (Approved for Reporting)

Not approved for reporting

Initials of Judge

Date:- 22.6.2005

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Application No. 358 of 2005

Raj Kishore Saxena
S/o late Sri P.B.L. Saxena
R/o Sai Sadan Vaishnav Vihar
Laxmi Narayan Puram, Raipur
Dehradun .....Applicant

Versus

1. Special Judge,
   Anti – Corruption, CBI
   Uttaranchal , Dehradun
2. Supt. of Police, CBI (Jai Swadesh)
   District Dehradun .....Respondents

Hon'ble J.C.S. Rawat, J.

Heard Sri Narayan Dutt learned counsel for the applicant and Sri Shobhit Saharia i/b for Sri U.K. Uniyal learned senior counsel for the C.B.I.

2. This petition under section 482 Cr.P.C. has been filed for quashing the chargesheet dated 22.10.1997 and the proceedings of the case No. 14/1997 CBI Vs. Rajkishore Saxena pending before the Special Judge, Anti-Corruption, CBI, Uttaranchal, Dehradun.

3. Brief facts of this case are that 26.3.1996 an FIR was lodged by the opposite party No. 2 under section 420 IPC and section 13(2) read with (1)(d) of P.C. Act 1988 against the applicant with the allegations that during the period from march 1995 to December 1995 the applicant travelled from Dehradun to Allahabad in the II class, but he wrongly claimed the railway fare of Ist class. Thus, the applicant falsely claimed Rs. 7,5,45/- from the department. The matter was investigated and thereafter the letter was sent to the headquarter for obtaining the sanction to prosecute against the applicant. Thereafter, the CBI sent a reminder dated 8.8.1996 (annexure-2) to the authority concerned for sanction to prosecute against the applicant, but no

sanction was given by the department. The C.B.I. continued the investigation and submitted the chargesheet after the retirement of the applicant. The applicant was retired on 30.9.1997 after attaining the age of his superannuation and the Investigating Officer (I.O) submitted the chargesheet against him on 22.10.1997. On the basis of the aforesaid chargesheet, the court took the cognizance.

4. The learned counsel for the applicant contented that admittedly the applicant was government servant at the time of incident and in view of Section 197 Cr.P.C. the applicant cannot be prosecuted without getting the sanction from the authority concerned. Therefore, in absence of any sanction of the competent authority, the prosecution against the applicant is wholly illegal and the prosecution has been lodged by malafide intention.

5. The applicant challenged the cognizance order before the Allahabad High Court under section 482 Cr.P.C. and after the creation of State of Uttaranchal the petition was received on transfer from the Allahabad High Court. Thereafter, the petition was dismissed for want of prosecution by this Court on 11.5.2001. Then, the applicant moved an application for recall of the said order, but the recall application was rejected vide order dated. 11.10.2001, Being aggrieved by the rejection order, the applicant filed special leave petition before the Hon'ble Supreme Court and the Hon'ble Supreme Court has remitted the matter to the High Court and it was directed to dispose of the matter expeditiously. Thereafter, on 13.3.2003 the High Court dismissed the same and held that the applicant while submitting false bills and drawn money by cheating cannot be said to have acted in the discharge of his duty, therefore,

sanction under section 197 Cr.P.C. is not a condition for launching prosecution against him.

6. Feeling aggrieved by the said order dated 13.3.2003, the applicant preferred special leave petition No. 1599/2003 before the Hon'ble Supreme Court. On 28.4.2003, the Special Leave Petition (S.L.P.) was dismissed as withdrawn with the liberty to raise the point taken in the S.L.P. in the appropriate proceedings. When the case was remitted back, the applicant moved immediately another application before the court below that the prosecution is not maintainable without obtaining the sanction a provided under section 197 Cr.P.C. It has been alleged in the application that the proceedings may be quashed as the sanction has not been obtained. The trial court rejected the said application.

7. The said matter was taken to the Apex Court and the Apex Court while dismissing the petition has given the liberty to the applicant to raise this point at the appropriate proceedings.

8. Now, the question arises before this Court is that what is the appropriate time. The learned counsel for the applicant contended that no cognizance can be taken without obtaining the sanction. As such the cognizance order is bad in law. The learned counsel for the applicant relied upon the decision of the Apex Court in **State of Orissa Vs. Ganesh 2004 AIR S.C.W. p/ 1926** in which it has been held that so far public servants are concerned the cognizance of any offence Is barred by section 197 Cr.P.C. unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty.

9. It has also been held that so far public servants are concerned the cognizance of any offence, by any Court,

is barred by section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no Court shall take cognizance of such offence except with the previous sanction'. Use of the words, 'no' and ' shall' make it abundantly clear that the bar on the exercise of power by the Court to take cognizance of any offence is absolute and complete. Very cognizance is barred.

10. It has been held In **State of H.P. Vs. M.P. Gupta 2004 (2) SCC p/ 349** that a petition under section 482 Cr.P.C. was filed before the High Court that the special Judge (Forest) Shimla has erred while framing the charge agasint the accused under section 120-B, 467, 468, 471, 420 IPC & section 5 Anti-Corruption Act 1947 (Old Act) corresponding to section 13(1)(d) of the New Act. In absence of requisite sanction as provided under the provisions of the Act, the High Court quashed the proceeding on the ground that there was no requisite sanction under the provisions of the code. Feeling aggrieved the instant petition was filed. The Hon'ble Apex Court allowing the appeal held that the protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. Section 197 can be invoked, it must be shown that the official concerned was accused

of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of the official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty. It was further observed that it can considered if omission of neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of the official duty. If the answer to this question is in affirmative, it may be said that such act was committed by the public servant while acting in the discharge of official duty. It has been further held as under: -

> *"17. The correct legal position, therefore, is that an accused facing prosecution for offences under the old Act or the new Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences. But the position is different in cases where section 197 of the Code has application."*

11. The learned counsel for the applicant referred the decision of the Apex Court in **P.K. Pradhan Vs. State of Sikkim 2001 (6) SCC p/704.** In that case, a chargesheet was submitted against the Chief Minister and officials u/s 120-B IPC read with section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act 1947 which correspond to section 13(2) read with

Section 13(1)(d) of Prevention of Corruption Act, 1988. The appellant raised a plea before leaned Special Judge that the prosecution may be dropped in absence of the requisite sanction. The High Court affirmed the decision of the Special Judge, Sikkim. Then, the appellant preferred the appeal before the Hon'ble Apex Court and the Hon'ble Apex Court while dismissing the appeal observed that the opportunity should be given to the defence during the trial that whether the act of the accused is in course of the performance of his duty or not. In such a case, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial.

12. The learned counsel for the C.B.I. contended that the protection under section 197 is only available when the alleged act done by the public servant is reasonably connected with the discharge of official duty and is not merely a cloak for doing the objectionable act. Therefore, the concept of section 197 does not get immediately attracted on institution of the complaint case to determine whether act falls within the meaning of the official act and official duty. It is a question of fact. The defence shall be given an opportunity to establish this fact during the trial and the petitioner can raise that pea in his defence and the court comes to the conclusion that the act complained was done in discharge of his official duty he will be entitled to be acquitted. It was further contended that the Hon'ble Apex Court would have been convinced at the initial stage of prosecution when S.L.P. was preferred and the petition would have been allowed by the Hon'ble Apex Court. The Hon'ble Apex Court would have set aside the order of the High Court. The Hon'ble Apex Court dismissed the petition, however, the opportunity was

given to the petitioner to raise the question at the appropriate proceedings. It was further contended that the petitioner immediately after obtaining the order of the Apex Court filed an application before the trial court without being made any progress in the proceeding and impugned order was passed by the trial court. The learned counsel for the petitioner contended that the prosecution is liable to be quashed in absence of requisite sanction. The reasoning recorded by the trial court while rejecting the application is not correct through the rejection is justified. It is the judicial discipline which should be observed by the court. The findings of the Hon'ble Apex Court superseding the findings of the High Court are always binding upon the lower court. Even the obiter-dicta of the Hon'ble Apex Court is binding upon the courts. In the instant case, I am completely in agreement to the contention of the learned counsel for the C.B.I. that the prosecution and the defence should be given an opportunity to lead their defence and the question can be decided effectively as to whether the act was in discharge of the duty. I am fortified by the following observations of the Apex Court in P.K. Pradhan (supra):-

> *"15. .....if the case is put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well settled that question of sanction under section 197 of the Code can be raised any time after the cognizance, may be immediately after cognizance or framing the charge or even at the time of conclusion of trial and after*

conviction as well. But there may be certain cases where it may not be possible to decide the question affectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."

13. It has to be seen that whether the act of the applicant was the discharge of the official duty or the dereliction of it. This fact can only be decided by the trial court after recording of the evidence.

14. In view of the above, I am of the view that the petitioner is at liberty to raise the point in question before the trial court in his defence. The trial court will consider the point of absence of the requisite sanction at the time of trial.

Accordingly, the petition is finally disposed of.

(J.C.S. Rawat, J.)

Dated 22.6.2005
LSR